In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-14

JOSELITO S. ARCA AND CORAZON I. ARCA PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The issue presented is whether 8 U.S.C. 1251(f), which waives deportation of certain aliens who gained "entry into the United States by fraud or misrepresentation * * *," applies to deportation of temporary visitors who overstayed the authorized visiting period.

Petitioners, husband and wife, are citizens of the Philippines and first arrived in the United States in 1966 for the purpose of permitting petitioner Corazon Arca to complete her internship and residency requirements in order to become a specialist in the field of pediatrics. While they were in this country, petitioners had two children who became American citizens upon their birth in the United States. Petitioners returned to the Philippines in July, 1970.

On September 15, 1970, petitioners reentered this country as nonimmigrant visitors for a period to expire on November 28, 1970. On September 18, 1970, three days after reentering the United States, petitioner Corazon Arca applied for a third preference visa. She was called before an Immigration Examiner on October 7, 1970, to discuss her application. During the course of this examination, she informed the examiner that when they returned to this country, petitioners had not intended to enter for a temporary visit but rather to remain permanently in the United States.

Shortly thereafter, petitioners were notified that the petition for a third preference visa had been approved, but since a visa number was not immediately available, they would have to leave the United States and await the availability of a number in another country (Pet. App. F, pp. 27-28). The reason for denying petitioners the privilege of remaining in the United States pending the availability of a visa number was that petitioners had had a preconceived intent to remain permanently in this country when they entered on temporary visitors visas (Pet. App. E, p. 26).

Petitioners did not depart the United States on November 28, 1970, and on March 9, 1971, the Immigration and Naturalization Service issued a Notice of Hearing and Order to Show Cause, charging that petitioners had overstayed their authorized period of admission. At the deportation hearing, petitioners, represented by counsel, conceded deportability. Petitioners were granted the privilege of voluntary departure on or before April 17, 1971 and waived appeal.

On April 16, 1971, petitioners filed a motion to reopen the deportation proceedings, requesting the Special

Inquiry Officer to reconsider their status and allow them to remain in the United States until their visa numbers became available. The Special Inquiry denied the motion.

Petitioners appealed to the Board of Immigration Appeals, requesting a reopening of deportation proceedings claiming, *inter alia,* that they were entitled to relief from deportation under Section 241(f) of Immigration and Naturalization Act (8 U.S.C. 1251(f)). The Board rendered its decision on July 18, 1972, re-affirming its ruling, *Matter of Mangabat* (Interim Decision 2131) (Pet. App. G), that "section 241(f) does not benefit an alien who entered as a nonimmigrant" (Pet. App. B, p. 20) The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioners claim that because their entry into the United States was gained by fraud in securing a temporary visitors visa and because they are parents of United States citizens, their deportation is waived by 8 U.S.C. 1251(f), as interpreted in *Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214. This argument was proffered in *Mangabat* v. *Immigration and Naturalization Service,* No. 72-6751, petition for a writ of certiorari pending, and is fully discussed in our Memorandum in Opposition in that case, upon which we rely here.[1]

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[1] We are serving upon petitioners' counsel a copy of our Memorandum in Opposition in *Mangabat.*

Contrary to petitioners' claims, there is no conflict between the holdings of the Ninth Circuit Court of Appeals and the decision below. Here, as in *Mangabat,* petitioners deportability was founded on their overstaying the period authorized and, accordingly, the fraud in procuring entry documents is irrelevant to that charge. See also, *Milande* v. *Immigration and Naturalization*

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

Service (C.A. 7), No. 72-1529, decided July 5, 1973. In any event the Ninth Circuit has recently held, in *Iqbal* v. *Immigration and Naturalization Service* (C.A. 9), No. 72-2539, decided June 27, 1973, that Section 1251(f) applies solely to aliens who enter as immigrants.